VII. VIOLATIONS OF LAW: WASTEWATER

A. Clean Water Act

As discussed above, the Clean Water Act requires municipalities to structure their rates in a proportionate manner, to ensure that each user pays his fair share.[860] Although the Clean Water Act does not define proportionality, the SWRCB, which promulgates regulations interpreting the Act, does, and it explicitly requires that COD be included in the sewer rate structure. Because the City's rate structure for the ten-year period from 1995 to 2004 did not fairly allocate the significantly higher cost of treating wastewater discharged by certain industrial users, resulting in residential users subsidizing the rates of industrial ones by millions of dollars per year, the City's rates were not proportionate and thus violated the Clean Water Act's proportionality requirement.

Enforcement authority for such violations is generally limited to the EPA and, through express delegation to the State, the SWRCB.[861] The agencies have broad authority and discretion to impose wide-ranging sanctions on a city, as extreme as terminating its grants and loans, suspending a city's work on a project, or rendering a city ineligible to receive future federal assistance.[862] The SWRCB's standard practice, however, is to pursue violations through less formal means like sending a notice of violation letter, as it did here.[863] The SWRCB typically escalates its enforcement action only when it deems it necessary to correct a violation.[864] Here, the EPA, and the SWRCB as its delegate, had the authority to take more aggressive action against the City than it did, in order to enforce the Clean Water Act and to remedy the violation. The agencies exercised their discretion not to do so. Nevertheless, the City was still liable for breaching the Clean Water Act, and the parties who caused the violation were also responsible for knowingly causing the City to

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860 Federal Water Pollution Control Act, Title II § 204(b)(1)(A), 33 U.S.C. § 1284(b)(1)(A) (West 2006).

861 There is no private right of action for the City's violation of the Clean Water Act. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 11 (1981).

862 40 C.F.R. § 35.965(a), (d), (e) (2006).

863 Letter from Ronald R. Blair, Sanitary Engineering Associate, State Water Resources Control Board, to Michael T. Uberuaga, City Manager (Mar. 17, 2004).

864 State Water Resources Control Board Water Quality Enforcement Policy, Resolution 96-030, as amended by Resolution 97-085 (Sept. 18, 1997). In his interview with the Audit Committee, Ronald Blair said that, to his knowledge, while the State never penalized a city for non-compliance, the State once threatened Los Angeles. Mr. Blair said that typically he would educate communities that were out of compliance and refer to the C.F.R. Codification of Penalties, which would result in compliance. Interview by the Audit Committee with Ronald Blair (Sept. 27, 2005).

persist in its violation of federal law and placing the City in jeopardy of being made the subject of a federal enforcement action.[865]

B. Proposition 218

Similar to the Clean Water Act, Prop 218 also contains a proportionality component, requiring that fees imposed upon "any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel."[866] Although the issue is not settled, there is authority suggesting that Prop 218's proportionality requirement applies to sewer charges, and, if so, the evidence shows the City violated this requirement.[867]

C. Criminal Liability

If the City or any employees made false statements regarding the City's compliance with proportionality requirements in order to obtain federal funds, those false statements could also constitute violations of certain criminal statutes, if made with intent to mislead the SWRCB, the federal government's agent in administering the EPA's grant and loan program.[868] The relevant statutes are as follows:

- 18 U.S.C. § 1001(a) provides that it is unlawful to "knowingly and willfully" falsify or conceal a material fact, make any materially

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865 Mr. Aguirre did not analyze or address possible substantive violations by the City under the Clean Water Act. City Attorney Michael J. Aguirre Wastewater Interim Report No. 1 City of San Diego Officials' Failure to Disclose Material Facts in Connection with the Offer and Sale of Wastewater Bonds and Related Improper Activity (Sept. 15, 2005).

866 Right to Vote on Taxes Act, art. XIII D § 6(b)(3) (Nov. 5, 1996).

867 In 2002, while silent on sewer user fees, a California Appellate Court held that Prop 218's proportionality requirements did apply in the analogous context of storm drainage fees. *Howard Jarvis Taxpayers Association v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). In 2004, the California Supreme Court concluded that water supply fees were "property related" and thus subject to Prop 218's proportionality requirement. *Richmond v. Shasta Community Services District*, 32 Cal. 4th 409 (2004). There, the Court further acknowledged that the "implication is strong" that charges for sewer user rates were also property-related and thus subject to Prop 218. *Richmond*, 32 Cal. 4th at 426-27. The Court stated that the implication was further "reinforced" by virtue of an express carve-out of the applicability of Prop 218's noticing requirements to sewer fees, without a similar carve-out for Prop 218's "other requirements." *Richmond*, 32 Cal. 4th at 426-27. A case is currently pending before the California Supreme Court regarding the slightly different and even more closely related issue of the applicability of Prop 218's proportionality to water user fees. *Bighorn-Desert View Water Agency v. Beringson*, 120 Cal. App. 4th 890 (2004) (on appeal to the California Supreme Court). In *Bighorn*, the Appellate Court held that water usage fees, analogous to sewer fees, are not subject to Prop 218 because they are not assessments "incident of property ownership" or fees for a "property related service." Based on the court's prior decision in *Richmond*, it may confirm Prop 218's applicability, and that same reasoning would apply to sewer rates as well.

868 In his Wastewater Interim Report No. 1, Mr. Aguirre did not analyze or reach conclusions regarding potential criminal liability resulting from the City's noncompliance. City Attorney Michael J. Aguirre Wastewater Interim Report No. 1 City of San Diego Officials' Failure to Disclose Material Facts in Connection with the Offer and Sale of Wastewater Bonds and Related Improper Activity (Sept. 15, 2005).

false, fictitious or fraudulent statement, or make a false writing knowing it to contain a materially false statement.[869]

- 33 U.S.C. §1319(c)(4) is the Clean Water Act's own specific false statement provision, making it a crime to knowingly make "any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter. . ." Section 13387(e) of the California Water Code mirrors the Clean Water Act with respect to false statements to the regional and state water boards.[870]

- 18 U.S.C. § 287 provides that it is unlawful to "make or present" to any person of the United States or any department or agency thereof "any claim" against the United States or any of its departments or agencies, "knowing such claim to be false, fictitious, or fraudulent."[871]

- 18 U.S.C. § 666(a)(1)(A) provides that it is unlawful for any agent of a local government to "obtain[] by fraud" or "intentionally misappl[y]" for property that "is valued at $5,000 or more." It applies in circumstances where a government "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving" a grant or loan.[872]

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869 18 U.S.C. § 1001(a) (West 2006). The applicability of this statute to the facts at hand remains an open question. A threshold question is whether statements made to State administrators of a federally funded and supervised program may constitute a false statement to the Federal Government. Federal funding coupled with retention of authority over the program are the keys to deciding whether statements made to State administrators constitute a false statement to the federal government. *See U.S. v. Wright*, 988 F.2d 1036 (10th Cir. 1993) (finding that false reports submitted to the State of Oklahoma which had received primary enforcement responsibility over drinking water standards from the EPA were subject to 18 U.S.C. § 1001 because the EPA retained the authority to enforce its regulations and because the EPA's funding of the Oklahoma public water program was conditioned on results of the reports filed).

870 33 U.S.C. § 1319(c)(4) (West 2006); Cal. West Code § 13387 (Deering 2006).

871 18 U.S.C. § 287 (2006). Not every misrepresentation made to the Government in the context of obtaining a benefit under a federal program implicates the False Claims Act. Instead, courts have looked to see when the false statement is relied upon for obtaining the federal benefit. *See, e.g., U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (stating that liability is determined by "(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's loss").

872 18 U.S.C. § 666 (West 2006). While the letter of the statute appears to apply to the facts at hand, it is more typically used for bribery cases. 18 U.S.C. § 666 is often referred to as the federal bribery statute, and is generally aimed at preventing the loss of federal funds through state or local government corruption. *See, e.g., Sabri v. United States*, 541 U.S. 600 (2004) (land developer was charged under 18 U.S.C. § 666 because he bribed a city council member to facilitate construction in the City of Minneapolis and the city had received tens of millions of dollars in federal funds during the same time period).